Filed 8/24/04 In re Antonio M. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ANTONIO M. et al., Persons Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. BONITA M., Defendant and Appellant.	F045460 (Super. Ct. Nos. JD099825, JD099826, JD099827 **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Richard J. Oberholzer, Judge.

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant and Appellant.

B.C. Barmann, Sr., County Counsel, and Jennifer L. Thurston, Deputy County Counsel, for Plaintiff and Respondent.

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Bonita M. appeals from orders terminating her parental rights (Welf. & Inst. Code, § 366.26) to her three children.[1] She contends the court erred by finding the children

[*] Before Dibiaso, Acting P.J., Harris, J., and Cornell, J.

adoptable and by not finding termination of her rights would be detrimental to the children. On review, we will affirm.

PROCEDURAL AND FACTUAL HISTORY

In June 2003, the Kern County Superior Court adjudged appellant's three children, who ranged from two to six years of age, dependents of the court and removed them from parental custody. The court previously determined the children came within its jurisdiction, in relevant part, under section 300, subdivision (b) due to appellant's neglect. On more than one occasion, she had left the children with their paternal grandmother without providing for their support or returning when she (appellant) promised she would. Appellant also failed to take her oldest child to school for at least a month despite his need for special education classes.

Despite six months of reunification services, appellant made little progress towards reuniting with her children. Notably, appellant only visited her children 20 times between April and August 2003. She had approximately 40 opportunities for visitation by virtue of the court's order for twice-a-week visits. Consequently, in November 2003, the court terminated reunification efforts and set a section 366.26 hearing to select and implement permanent plans for each of the children.

In anticipation of the section 366.26 hearing, respondent Kern County Department of Human Services (the department) prepared a social study which included an assessment recommending that the court find the children were likely to be adopted and order termination of parental rights. The department based its recommendation on the following factors:

> "[The children] are healthy and well-adjusted Hispanic children. Their current foster mother has provided them with a stable, loving home and she is committed to adoption. The children have shown that they are

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1 All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

> capable of forming attachment, they have delightful personalities. They have also demonstrated that they can learn proper behavior when they are given the correct guidance. Their current foster mother is also their grandmother. She is strongly committed to adoption and she has submitted an application to adopt. If, for some reasons, the caretaker will not be able to adopt, the adoption agency will face a challenge in finding another adoptive home for them."

The department also reported that the two older children suffered from speech articulation problems but were receiving speech and language therapy services. All three children were eligible for adoption assistance monies based on their age (they were over three years old), their ethnicity, their formation of a sibling group which should remain in tact, and their parents' drug involvement. The children wanted to live with their grandmother forever. The department's preliminary assessment of the paternal grandmother, as the children's prospective adoptive parent, was also favorable in all respects. For appellant's part, she had had but one visit with the children since the court terminated reunification efforts.

At the section 366.26 hearing, the parties submitted the case on the department's social study. Appellant's counsel in turn argued that termination would be detrimental to the children upon section 366.26, subdivision (c)(1)(A) based on undisputed evidence that they shared "a bond of attachment" with their mother and interacted appropriately during visits. The children' counsel acknowledged that the children enjoyed seeing their mother but there was no evidence that a continued relationship would outweigh the benefits of adoption. The department's counsel noted that appellant could not prevail under section 366.26, subdivision (c)(1)(A) because she did not maintain regular visitation and contact with the children during their dependency.

Following argument, the court found the children adoptable and terminated parental rights.

DISCUSSION

Adoptability

Appellant contends there was no clear and convincing evidence to support the court's finding that her children were likely to be adopted. From her viewpoint, the children were not generally adoptable because they were eligible for adoption assistance; the two older children were difficult to understand and suffered from language delay; and the department admitted it would be a challenge to find them an adoptive home if the paternal grandmother were unavailable to adopt. Appellant further argues the only evidence the court had to reach its conclusion was the paternal grandmother's willingness to adopt the twins; however, this was not enough. In appellant's estimation, the paternal grandmother essentially could not be trusted to follow through with the adoption and there was no evidence that other approved families were available to adopt the three children. As discussed below, we disagree.

First, although the juvenile court must make its adoptability finding by clear and convincing evidence (§ 366.26, subd. (c)(1)), the "clear and convincing" standard of proof is not a standard for appellate review (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750). The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine. If there is substantial evidence to support the court's finding, the determination is not open to review on appeal. (*Ibid.*) In other words, the clear and convincing test disappears on appeal and the usual rule of conflicting evidence is applied. (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 881.)

Second, our review of the record reveals there was sufficient evidence to support the adoptability finding. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.) As appellant observes, the issue of adoptability focuses on the minor, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. All that is required is clear and convincing evidence of the

likelihood that adoption will be realized within a reasonable time. (*In re Zeth S.* (2003) 31 Cal.4th 396, 406.) The likelihood of adoptability may be satisfied by a showing that a child is *generally* adoptable, that is, independent of whether there is a prospective adoptive family " ' "waiting in the wings." ' " (*In re Jayson T.* (2002) 97 Cal.App.4th 75, 85 citing *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.)[2] However, the case law also recognizes that the juvenile court may properly consider a prospective adoptive parent's willingness to adopt as evidence that the child is likely to be adopted within a reasonable time. (*In re Sarah M., supra,* 22 Cal.App.4th at pp. 1649-1650.)

Here, the department acknowledged it would be a challenge to find appellant's three children an adoptive home if the paternal grandmother were unavailable to adopt. However, that acknowledgement did not compel a finding that it was unlikely the children would be adopted. All three children were young, healthy and well-adjusted. They also had delightful personalities. They demonstrated their ability to learn proper behavior when given proper guidance as well as their capacity to form attachments. Furthermore, their paternal grandmother with whom they had been placed for the preceding five months was committed to adopting them and had been identified as their prospective adoptive parent. Indeed, she had expressed her desire to provide a permanent home for the children since the outset of their dependency.

To the extent she complains about the grandmother, appellant misreads the record and draws unreasonable inferences. Appellant apparently blames the grandmother for the children's dependency because it was the grandmother who contacted the department when appellant disappeared. As appellant sees it, the grandmother called the department because, with the children in her home, she could not leave for work. Further, in

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[2] The California Supreme Court in *In re Zeth S., supra,* 31 Cal.4th 396 disapproved *Jayson T., supra*, on other grounds, namely the appellate court's willingness to consider post-judgment evidence to reverse a termination order.

appellant's estimation, it was the children's aunt, not the grandmother, who cared for the children throughout their dependency. In essence, appellant questions the grandmother's level of commitment to adoption.

We disagree with appellant's view of the record. Contrary to appellant's claims, the paternal grandmother proved herself to be the one constant in these young children's lives. She provided a home for them on more than one occasion before this dependency. She expressed an interest from the outset of these proceedings to provide them a permanent home. She requested placement of all three children; however, the department could not accommodate her request due to the small size of her home. Undaunted, the paternal grandmother provided daycare for the children while their paternal aunt, with whom they were initially placed, was at work. The grandmother even went so far as to locate another and larger home so that the children could be placed with her, all of which was accomplished five months before the section 366.26 hearing. On this record, the court could reasonably infer that the grandmother made the initial referral to provide long-term protection for the children, rather than as a matter of convenience for herself.

Further, appellant's reliance on the fact that the children qualified for adoption assistance is little more than an invitation for this court to reweigh the evidence, something which this court cannot do. (*In re Laura F.* (1983) 33 Cal.3d 826, 833.) Indeed, many of the questions appellant now raises about the record are ones she should have voiced in the juvenile court. This is because on review we apply the traditional standard of resolving any and all evidentiary conflicts in favor of the respondent drawing all legitimate inferences to uphold the juvenile court's finding. (*In re Brison C., supra,* 81 Cal.App.4th at pp. 1378-1379.) As a reviewing court asked to assess the evidentiary sufficiency of a particular finding, we may not reweigh or express an independent judgment on the evidence. (*In re Laura F., supra,* 33 Cal.3d at p. 833.)

Third, we reject appellant's claim that caselaw required evidence of other approved families who were available and willing to adopt the children. According to

appellant, if the likelihood of a child's adoptability is premised in whole or in part on the desire of a prospective adoptive parent to adopt the child, then the department must offer evidence of other approved families willing to adopt the child. In crafting her argument, she cites several cases, none of which stands for such a position or involves a fact pattern similar to the present case. (*In re Asia L.* (2003) 107 Cal.App.4th 498; *In re Josue G.* (2003) 106 Cal.App.4th 725; *In re Jayson T., supra,* 97 Cal.App.4th 75; *In re Jerome D.* (2000) 84 Cal.App.4th 1200; *In re Jennilee T.* (1992) 3 Cal.App.4th 212; *In re Amelia S.* (1991) 229 Cal.App.3d 1060.)

At most, in *In re Asia L., supra,* 107 Cal.App.4th at page 512 and *In re Jerome D., supra,* 84 Cal.App.4th at page 1205, the appellate courts noted there was no evidence of any approved families willing to adopt children such as those in each case. However, appellant ignores the lack of any holding in either opinion that requires such proof. She also overlooks the underlying circumstances in each of those dependencies and their dissimilarity to the present case.

In *In re Asia L., supra,* 107 Cal.App.4th 498, dependent children had emotional and behavioral problems serious enough to make them difficult to place for adoption (§ 366.26, subd. (c)(3)). Notably, they were not in an adoptive placement. At best, their foster parents were willing to "explore the option of adoption." (*In re Asia L., supra,* 107 Cal.App.4th at p. 512.) The *Asia L.* court considered such evidence "too vague" to support an adoptability finding. (*Ibid.*)

In *In re Jerome D., supra,* 84 Cal.App.4th at page 1205, the appellate court reversed an adoptability finding that it determined was based on the willingness of a child's stepfather to adopt him. The *Jerome D.* court held such evidence would not suffice because the adoption assessment failed to address the stepfather's criminal and Child Protective Services history, which was not insubstantial, as required by section 366.22, subdivision (b)(4).

Were we to extrapolate a rule from the *Asia L., supra,* and *Jerome D., supra,* opinions, it might be that, when there is no evidence that a child is generally adoptable and the child is not in an adoptive placement or there is no favorable preliminary assessment of a prospective adoptive parent, then the correctness of an adoptability finding may depend on evidence of approved families willing to adopt such a child. However, we fail to see that either opinion or any of the other cited decisions stands for the proposition appellant endorses. More importantly, the types of situations posed in *Asia L., supra,* and *Jerome D., supra,* bear no resemblance to this case.

Here, even assuming arguendo that appellant's children were not generally adoptable, they were in an adoptive placement. They had been in that placement for more than five months. In fact, the record reveals the paternal grandmother, who was "strongly committed" to adopting the three children, opened her home to them prior to their dependency and subsequently provided day care for them when they were initially placed with a paternal aunt. Further, the assessment of the paternal grandmother as the prospective adoptive parent addressed in a favorable manner each of the statutory factors relating to her eligibility and commitment to adoption.

Finally, we would agree with the following observation from *Jayson T., supra,* 97 Cal.App.4th at page 85, one of the other opinions appellant relies upon.

> "[I]t is only common sense that when there is a prospective adoptive home in which the child is already living, and the only indications are that, if matters continue, the child will be adopted into that home, adoptability is established. In such a case, the literal language of the statute is satisfied, because 'it is likely' that that particular child will be adopted."

For all the reasons stated above, we conclude that the juvenile court did not err in finding it likely the children would be adopted.

No Detriment

Appellant also contends the court erred when it declined to find termination would be detrimental to the children's best interests. She claims she was entitled to such a

finding because the children shared an attachment with her and would benefit from continuing the relationship. While appellant attempts to rely on the exception enumerated in section 366.26, subd. (c)(1)(A), she overlooks the statute's initial requirement that she had to maintain regular visitation and contact with her children in order to attempt to persuade the court that termination would be detrimental due to the benefit the children would derive from an ongoing relationship.[3] On this record, the court could properly find appellant did not maintain regular visitation and contact with her children. As previously mentioned, during the first five months she visited with the children, virtually half the time to which she was entitled and in the subsequent five and one-half months before the section 366.26 hearing, she visited only once. Accordingly, appellant was not entitled to a finding that termination would be detrimental to the children.

DISPOSITION

The orders terminating parental rights are affirmed.

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[3] Section 366.26, subdivision (c)(1)(A) provides that a court will terminate parental rights as to a child likely to be adopted unless it finds termination would be detrimental to the child because "the parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."